

E-FILED on 4/10/08

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

A.T., a minor, by and through GENNIE T., his
Guardian Ad Litem,

Plaintiff,

v.

PAJARO VALLEY UNIFIED SCHOOL
DISTRICT and DOES 1-25,

Defendants.

No. C-07-04144 RMW

ORDER APPROVING IN PART
DEFENDANT'S REQUESTED ATTORNEY'S
FEES

[Re Docket No. 5, 14]

On March 26, 2008, the court orders denied defendant's motion to dismiss plaintiff's complaint for ineffective service, conditioning its denial of the defendant's motion on plaintiff's counsel's payment of the defendant's "reasonable attorney's fees incurred for making its motion to dismiss and for the court appearance for the hearing on the motion." Docket No. 14 at 4. It ordered defendant to file a declaration itemizing the hours spent and hourly rate charged for its attorney's fees incurred in connection with its motion to dismiss. *Id.* On March 31, 2008, defendant submitted a declaration in support of its request for \$8,388.00 in attorney's fees. *See* Docket No. 16, Decl. of Kimberly Smith Regarding Attorney's Fees Incurred in Connection with Defendant's Motion to Dismiss the Complaint for Ineffective Service of Process ("Smith Decl."). On the same day, plaintiff filed a declaration challenging the requested amount as excessive. *See* Docket No. 17,

Decl. of Plf's Counsel in Reply to Defense Decl. and Supporting Documentation on Fees Incurred in Motion to Dismiss ("Varma Decl.").

Based on defendant's counsel's declaration and the billing records attached thereto, the work on the motion to dismiss was done by two attorneys, partner Kimberly Smith and associate attorney Summer Dalessandro.¹ Smith Decl. ¶¶ 6. The billing records indicate that Ms. Smith billed 21.2 hours on the motion to dismiss while Ms. Dalessandro billed 17.8 hours. *Id.* Exs. A-C. Plaintiff's counsel contends first, that the attorney's fees requested for drafting the motion to dismiss are excessive and second, that the 11.2 hours billed for Ms. Smith's travel to and from Los Angeles to attend the hearing on the motion were unnecessary. Varma Decl. ¶¶ 4, 13.

In support of his contention that the fees requested for drafting the motion to dismiss are excessive, plaintiff's counsel submits the opening and reply briefing submitted in support of a similar motion to dismiss before Judge Breyer in *E.N. v. Byron Union School Dist.*, Case No. C 06-06052-CRB. *Id.*, Exs. 1-2. In *Byron*, the school district was represented by the same firm as defendant in this case, Fagen, Friedman & Fulfroost, LLP. The court has compared the opening and reply briefing for the motion to dismiss in *Byron* to the opening and reply briefing for the motion to dismiss in this case. As pointed out by plaintiff's counsel, although the briefs are not identical, the legal arguments and authorities cited are the same in both sets of briefing. Some of the issues in the instant case are unique, but it is fairly clear to the court that the briefing in this case was derived, if not from the briefing in *Byron*, then a common ancestor to both motions. It does, indeed, appear to the court that 17.8 hours of Ms. Dalessandro's time and 10 hours (excluding time billed for travel time) for Ms. Smith's time, is excessive for drafting the motion to dismiss that was submitted in this case, particularly in light of the substantial similarity between the briefing in this case and the briefing on the motion to dismiss in *Byron*. It should have taken no more than 10 hours of an associate's time and 3 hours of a partner's time to draft and file the motion to dismiss. The court finds, however, that the 1.5 hours billed by Ms. Smith to draft and submit her declaration regarding attorney's fees in response to the court's order on the motion to dismiss is reasonable.

¹ Ms. Dalessandro bills at a rate of \$190/hr; Ms. Smith initially billed at \$220/hr (accounting for 4.1 of her 21.2 hours) but her hourly rate has increased to \$240/hr (accounting for 17.1 of her 21.2 hours).


Plaintiff's counsel also asserts that it was unnecessary for Ms. Smith to appear for the hearing from Los Angeles. He asserts that Ms. Dalessandro and another Fagen Friedman partner whose name appears in the caption for the pleadings in this case, Laurie Reynolds, are both based out of the Oakland office of Fagen Friedman and could have appeared instead of Ms. Smith to save costs. Defendant is entitled to have its motion argued by an attorney of its choice. Defendant's billing records do not indicate that Ms. Reynolds ever worked on the motion to dismiss and defendant was not obligated to require Ms. Dalessandro argue instead of Ms. Smith. The court therefore finds that the 11.2 hours billed by Ms. Smith constitutes time reasonably incurred for the court appearance in this matter.

Accordingly, the court approves 10 hours of Ms. Dalessandro's time and 15.7 hours of Ms. Smith's time (3 + 1.5 + 11.2) as reasonable attorney's fees incurred for defendant's motion to dismiss and court appearance on the matter. Ms. Dalessandro's time shall be billed at her hourly rate of \$190; Ms. Smith's time shall be billed at her current hourly rate of \$240.² Therefore, the approved attorney's fee amount is \$5,668.

ORDER

For the foregoing reasons, the court approves attorney's fees of \$5,668. As set forth in the court's March 26, 2008 Order, plaintiff's counsel must pay this amount within ten (10) days of the order or the case will be dismissed without further warning or notice.

DATED: 4/10/08


RONALD M. WHYTE
United States District Judge

² Of the 21.2 hours originally billed for Ms. Smith, 4.1 hours were billed at her previous hourly rate of \$220 and 17.1 hours were billed at her current hourly rate of \$240. Given the ratio of hours billed at the lower rate, the court finds it appropriate to apply Ms. Smith's new rate to the adjusted hour total.

1 Notice of this document has been electronically sent to:

2 **Counsel for Plaintiff:**

3 Bob Varma bvarma@varmaclancy.com

4 **Counsel for Defendants:**

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7 Counsel are responsible for distributing copies of this document to co-counsel that have not
8 registered for e-filing under the court's CM/ECF program.

9
10 **Dated:** 4/10/08

/s/ MAG
11 **Chambers of Judge Whyte**